JUN 24 1976

In The

SUPREME COURT OF THE UNITED STATES

No. 75-1859

DEAN TAYLOR,

Petitioner,

vs.

LIBERAL MARKET, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARLES J. SIMPSON of
SIMPSON & LACHEY
300 Dayco Building
333 West First Street
Dayton, Ohio 45402
Attorney for Petitioner

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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In The

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No. ———

DEAN TAYLOR,

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vs.

LIBERAL MARKET, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Dean Taylor, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on February 24, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. 1a-2a. The opinion of the United States District Court for the Southern District of Ohio, Western Division at Dayton, is unreported, and appears at Appendix B, infra, pp. 3a-9a.

JURISDICTION

The order or judgment of the United States District Court of Appeals for the Sixth Circuit was entered on February 24, 1976. See Appendix A, pp. 1a-2a. A petition for rehearing was filed with the United States Court of Appeals on March 9, 1976. See Appendix C, pp. 10a-13a. On April 6, 1976 the United States Court of Appeals entered its order denying the petition for rehearing. See Appendix D, p. 14a. This petition for certiorari was filed less than 90 days from the date of the order, denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The Petitioner, Dean Taylor, brought this action seeking declaratory relief that the wage and price controls under the Economic Stabilization Act of 1970 were no longer binding upon the parties and that it is legal to now pay lost wage increases. The questions thereby arising are:

1. Whether the action of the Court of Appeals for the Sixth Circuit in affirming the lower court judgment holding that a contract granting a wage increase in excess of the wage controls of the Economic Stabilization Act may not be enforced after the expiration of the act is consistent with the case of *U. S.* v. *California*, 504 F.2d 750 (1974), cert. denied, 43 L.W. 3643 (1975).

2. Whether Article XV of the collective bargaining agreement between the parties which provides for the payment at such time as it is legal to do so of wage increases lost during the period of wage and price controls is enforceable.

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

The petitioner, Dean Taylor, is and has been at all relevant times an employee of The Liberal Market, Inc. Teamster Local 957 is the bargaining representative for Liberal's warehouse employees. Mr. Taylor has been and is a member of said bargaining unit and Local 957.

The Liberal Market, Inc. is a firm in the retail food industry with its offices and principal place of business in Dayton, Ohio.

PRE-LITIGATION FACTS

During the summer of 1972, Liberal and Local 957 negotiated a new collective bargaining agreement. During the course of these negotiations, Local 957 proposed an increase in straight time hourly wages of thirty-five cents per hour for each of three years. This proposal by Local 957 was incorporated in the final agreement to be effective for a three year period ending August 1, 1975. The new agreement was executed on August 5, 1972 but was effective by its terms as of August 1, 1972. It provided for several increases in wage and fringe benefits to be effective during the first contract year among them an increase in straight time hourly wage rate of thirty-five cent raise was provided for each of the two succeeding years.

The agreement was executed during the period of Phase II of Economic Controls. During Phase II, bargaining units were generally limited to annual increases in wages and fringe benefits equal to 5.5 percent. Amounts in excess of that limit could be paid only if prior approvals

(called "exceptions") were obtained from the Pay Board or one of the District Directors of the Internal Revenue Service. It was understood by the parties to the agreement that an exception request would be necessary. It was also realized, however, that an application for an exception might be denied. Accordingly, a savings clause was included in the bargaining agreement by which the company in effect agreed that if any part of the wage increases could not be paid at the time they were due, they would be paid at such time as permitted by law.

That provision of the contract is as follows:

ARTICLE XV

SAVING CLAUSE—RE WAGE FREEZE

> If any proposal submitted by the Union, if granted, may not be put into effect because of applicable legislation, Executive Orders or Regulations dealing with Wage and Price Stabilization, then such proposals or any part thereof, including any retroactive requirement thereof, shall become effective at such time, in such amounts, and for such periods, retroactively and prospectively, as will be permitted by law at any time during the life of this agreement and any extension thereof.

Because of the wage and price limitations in effect at the time the agreement was entered into, Liberal was limited to paying the equivalent of eighteen cents per hour of the bargain for thirty-five cents per hour increase. It applied for an exception on August 21, 1972, so as to be able to pay the remaining seventeen cents per hour but this request was denied on September 6, 1972, by Director Schuster and the seventeen cents per hour was not paid. An exception request filed later for the following year was

granted and the bargained for wage increase for that year was paid. However, the seventeen cents per hour increase lost in the first year on the contract was still not paid.

By letter dated April 26, 1974, Gary L. Legg, President of Local 957, stated that he understood that controls dropped on April 30, 1974, and requested that Liberal implement the seventeen cent increase which had been put into effect during the wage control period and to make payment of such amount. Liberal increased wages by the seventeen cents per hour effective May 1, 1974, with respect work performed on or after such date, but refused to pay the seventeen cents per hour for the period August 1, 1972, through August 30, 1974.

LITIGATION FACTS

On August 22, 1974, Mr. Taylor, individually and as a representative of the class consisting of the members of Local 957, instituted an action seeking declaratory relief that the wage controls under the Economic Stabilization Act of 1970 were no longer binding upon the parties and that it was legal to now pay the lost increases.

On January 2, 1975, Liberal moved the United States District Court for the Southern District of Ohio, Western Division pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment. On January 27, 1975, Mr. Taylor filed a similar motion for summary judgment.

On May 14, 1975, the Honorable Carl B. Rubin sustained Liberal's motion for summary judgment and overruled Taylor's motion. This opinion appears at Appendix B, infra, pp. 3a-9a.

On June 12, 1975, Taylor filed a Notice of Appeal with the District Court, and the appeal was docketed in the

United States Court of Appeals for the Sixth Circuit on July 21, 1975.

On February 24, 1976, the Court of Appeals entered its decision which affirmed the lower court's judgment. Said decision was entered without opinion.

REASONS FOR GRANTING THE WRIT

1. The case presents an issue of great public importance.

It is of widespread public importance that the Court consider the issues here presented so that the lower courts and employers and employees may be guided authoritatively with respect to the payment of wages lost during the period of wage and price freezes.

During the control period of the Economic Stabilization Act of 1970, thousands of collective bargaining agreements were entered into by employers and their employees or representatives, most of which contain a provision similar to Article XV of the agreement in this case. Most of these contracts also provided for wage and benefit increases above the limitations imposed by the Pay Board or the Cost of Living Council. As a result many employees received only a portion of the wage increase agreed upon by the employers or representatives. As of yet there has been no definitive ruling as to whether a union or an employee can recoup wages lost during the economic control period. We are speaking of thousands of employees and employers across our nation who are without guidance as to their respective rights and obligations. In the present case alone we are dealing with over one hundred employees and thousands of dollars.

2. The decision below conflicts with the law and decisions of courts in other jurisdictions.

In the present case, The District Court held that the parties remained liable under the Economic Stabilization Act after its expiration by the operation of the general savings statute, 1 U.S.C. § 109. We can only surmise that the Court of Appeals agreed with this finding in as much as no opinion was filed with its decision.

The authority to enforce or issue orders under the Act expired on April 30, 1974, except as saved by Section 218 of the Act or by the general savings statute § 109.

Section 218 of the Economic Stabilization Act provides:

> The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1974, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1974.

This Court in the Case of *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 at 554-555, 74 S. Ct. 745 at 756, stated that the "object of the general savings statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, or of regulations issued under it, occurring before its expiration."

The issue involved herein is whether or not any act was committed prior to May 1, 1974, upon which any enforcement proceeding could be brought. Clearly from the facts there is none.

The argument was raised below that the denial of the request for an exception to the wage controls is still binding upon the parties and payment now would be a violation of said order. It was also contended that an action could be brought by the government against the employer

within the exception of Section 218, in that the work for which the payment is to be made was performed prior to the expiration of the Economic Stabilization Act. It was further argued that the inclusion of Article XV in the collective bargaining agreement, and the request for exception constitute acts in violation of the wage and price controls.

These arguments and the decision of the Court in this case are contrary to the decision in the case of *U.S.* v. *California*, 504 F.2d 750 (T.E.C.A. 1974), cert. denied, 43 L.W. 3643 (1975).

The California case involved wage increases for work performed during the period that controls were in effect. The Cost of Living Council (CLC) challenged the amount of the increases and issued an order disallowing a portion of said increases. The State of California, the employer, complied with this order. However, upon the expiration of the Act it acted to retroactively pay the increases disallowed by the CLC. The government then filed suit to enjoin said payments. The Temporary Emergency Court of Appeals held that the CLC orders could not be enforced after the expiration date of the Act to preclude wage payments in excess of such orders, even to work performed during the control period, so long as the actual payments were not made prior to the expiration date of the Act.

In the California case, the government argued that there were several acts committed prior to the expiration date upon which an action could be brought, namely that the State Budget Act was passed by the California Legislature during the control period, that the state filed a request for review of the CLC order, and that the State threatened to implement said increases after the CLC order. The Court held that none of those were sufficient to constitute

an act under Section 218. The Court ruled that only the payment of wages in violation of the CLC order during the Control period could constitute an "act" within the meaning of that word as used in Section 218.

Applying the California decision to the instant case reveals that no act was committed prior to May 1, 1974, within the meaning of Section 218 of the Act and therefore the Economic Stabilization Act no longer restrains the payment of the lost wage increases.

The present case is clearly distinguishable from the case of *U. S.* v. *International Brotherhood of Electrical Workers, Local 11,* 475 F.2d 1204 (T.E.C.A. 1973). In the *I.B.E.W.* case, after an agreed wage increase was disallowed the employers and employees entered into escrow agreements under which the disallowed amounts were placed in escrow to be released "at such time as they may legally do so." The representative of the employees sought reconsideration of the denial of the exception request. Said decision was affirmed and the parties were specifically notified that the escrow accounts were in violation of the Act.

The *I.B.E.W.* case involved the actual payment of money during the control period, The Court held these payments into the escrow account to be in reality payments to the employees. It should be noted that the escrow agreements were entered into after the disapproval of the wage increase and that on reconsideration the escrow agreements were specified as being in violation of the Act. Here the intent of the Act was being frustrated and orders of the Pay Board were being clearly violated. In the present case there has been no payment of the disputed wages to the employee within the effective period of the Economic Stabilization Act.

In summary, there were no acts committed prior to May 1, 1974 which qualify as a violation so as to cause the application of the general savings statute supra, or Section 218 of the Act.

The clear intent of the wage control program was to prevent excess dollars from entering the economy and fueling inflationary pressures during a particular period of time. The Act merely authorized the President to issue regulations limiting prices and wages paid during the effectice period of the Act.

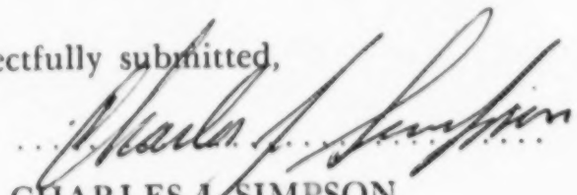
No where in the Act is the President or any of his delegates authorized to declare any wage agreement illegal nor is there any provision in the Act declaring any type of contract or contract provision illegal. The Act merely authorized the President to suspend or permit the payment of wages during the effective period of the Act.

The ruling of the Court of Appeals appears to conflict with the decision in the California case cited supra. We believe that there will be decisions in other jurisdictions which may agree or conflict with the California case or the decision in this case. We believe it is of great public importance and of great importance to the many employers and employees in similar circumstances that this Court review this case and issue a definitive decision on the merits of the arguments.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



CHARLES J. SIMPSON

Suite 300 Dayco Building
333 West First Street
Dayton, Ohio 45402

Counsel for Petitioner

AFFIDAVIT OF SERVICE

STATE OF OHIO)
) SS.
COUNTY OF MONTGOMERY)

Charles J. Simpson first being duly cautioned and sworn according to law says that he is the attorney for the Petitioner herein and that three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was served upon R. Joseph Parker, Attorney for Respondent, 600 Dixie Terminal Building, Cincinnati, Ohio 45202 on the 21st. day of June, 1976 by United States Mail, first class postage prepaid.

Charles J. Simpson

CHARLES J. SIMPSON

Sworn to and subscribed in my presence by the said Charles J. Simpson on this 21st day of June, 1976.

Kathleen Meehan

Notary Public

KATHLEEN MEEHAN, Notary Public
In and for Montgomery County, Ohio
My Commission Expires March 30, 1981

APPENDIX A

No. 75-1864

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEAN TAYLOR,
Plaintiff-Appellant,

vs.

LIBERAL MARKET, INC.,
Defendant-Appellee.

ORDER

(Filed February 24, 1976)

Before: PECK, McCREE and LIVELY, Circuit Judges.

Plaintiff-appellant Dean Taylor, has appealed from summary judgment entered in the district court in favor of Liberal Market, Inc., his employer, in an action for retroactive payment of wage increases provided in a collective bargaining agreement but exceeding the 5.5 percent limitation of wage adjustments under the Economic Stabilization Act of 1970. Upon consideration of the entire record, and noting that a previous panel of this court, by order dated November 3, 1975, found it to have jurisdiction, the court concludes that the defendant-appellee was entitled to summary judgment.

The judgment of the district court is affirmed.

Judge McCree would dismiss the appeal for lack of jurisdiction on the ground that exclusive power to review this case is vested in the Temporary Emergency Court of Appeals.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C3-74-146

DEAN TAYLOR,
Plaintiff,

vs.

LIBERAL MARKET, INC.,
Defendant,

and

UNITED STATES OF AMERICA,
Intervenor-Defendant.

**FINDINGS OF FACT,
OPINION AND
CONCLUSIONS OF LAW**

(Filed May 14, 1976)

This matter is before the Court for disposition by agreement upon the plaintiff's and defendant's cross-motions for summary judgment pursuant to Rule 56, Fed. R. Civ. P., and for the certification of this matter as a class action pursuant to Rule 23, Fed. R. Civ. P.

Plaintiff seeks a declaratory judgment that the wage and price controls under the Economic Stabilization Act of 1970 are no longer binding upon wages claimed due to the plaintiff and those similarly situated.

Plaintiff asserts also that the defendant is obligated Article XV of the collective bargaining agreement to pay those wage increases which were lost because of such wage and price controls. The determination of this motion will be made in accordance with Rule 52 of the Federal Rules of Civil Procedure, and the Court does submit herewith its findings of fact and conclusions of law.

I

FINDINGS OF FACT

1. Plaintiff Dean Taylor is, and has at all relevant times been, an employee of defendant The Liberal Market, Inc. ("Liberal"). Teamsters Local 957 is the bargaining representative for Liberal's warehouse employees classified as Freezermen, Drivers, Lead Men, Lift Operators, Warehousemen or Warehouse Porters (the "warehousemen"). Mr. Taylor is, and has at all relevant times been, a member of that bargaining unit and a member of Local 957.

2. Defendant Liberal operates in the retail food industry with offices and principal place of business in Dayton, Ohio. Liberal purchases raw agricultural products, dry grocery products and canned goods from suppliers located in at least thirty-five different states, stores these and other products in its warehouse, and transports such products to its retail supermarkets located in Ohio and Kentucky for resale to consumers.

3. During the course of contract negotiations, Local 957 proposed an increase in straight time hourly wages

of thirty-five cents per year for each of three years. This proposal by Local 957 was incorporated in the final agreement which became the collective bargaining agreement (the "Agreement") effective for a three year period ending August 1, 1975. (Exhibit 1). The new collective bargaining agreement was actually executed August 5, 1972, but was effective as of August 1, 1972, by its terms. It provided for several increases in wages and fringe benefits during the first contract year (August 1, 1972 – July 31, 1973). Among such increases a straight time hourly wage rate of thirty-five cents. A similar thirty-five cent raise was provided for each of the two succeeding contract years (August 1, 1973 – July 31, 1974 and August 1, 1974 – July 31, 1975).

4. The Agreement was executed during the period of Phase II of economic controls. During Phase II, bargaining units were generally limited to annual increases in wages and fringe benefits equal to 5.5%; amounts in excess of that limit could be paid only if prior approvals (Called "exceptions") were obtained from the Pay Board or from one of the District Directors of the Internal Revenue Service to whom the Pay Board had delegated the responsibility to initially consider and rule upon such exception requests.

5. The aggregate value of the wage and fringe benefit improvements scheduled under the Agreement to be implemented during the first contract year exceeded the 5.5% limit by seventeen cents per hour, and in the absence of an exception, Liberal was limited to an increase of only eighteen cents per hour of the thirty-five cents per hour increase provided as of August 1, 1972, under the Agreement. This was reflected in a letter of understanding, also dated August 5, 1972. (Exhibit 2).

6. On August 21, 1972, Liberal's Director of Personnel submitted an exception request (Exhibit 3) on behalf of Liberal, Local 957 and the warehousemen to District Director Paul A. Schuster requesting permission to implement the additional seventeen cent increase in straight time wages scheduled under the Agreement to become effective as of August 1, 1972. On September 6, 1972, District Director Schuster denied that request. (Exhibit 4). Neither Liberal nor Local 957 nor any of the warehousemen filed an appeal from this decision.

7. Because of the 5.5% limit, on August 1, 1973, Liberal was able to implement only twenty-seven cents of the thirty-five cent increase scheduled for the second contract year. On August 31, 1973, Peter J. Rakay, Esq., attorney for Local 957, wrote to Peter A. Tchirkow of the Cost of Living Council requesting an exception for Liberal to pay the additional eight cents per hour. (Exhibit 5).

8. On March 6, 1974, the Cost of Living Council issued a "Decision and Order" authorizing Liberal to pay the additional eight cents (8¢) per hour for the second contract year. (Exhibit 6). Payments were made retroactively to August 1, 1973. The warehousemen thereby received the entire thirty-five cent per hour increases provided for the second contract year.

9. Article XV of the Agreement provides:

> If any proposal submitted by the Union, if granted, may not be put into effect because of applicable legislation, Executive Orders or Regulations dealing with Wage and Price Stabilization, then such proposals, or any part thereof, including any retroactive requirement thereof, shall become effective at such times, in such amounts, and for such periods, retroactively and prospectively, as will be permitted by

> law at any time during the life of this Agreement and any extension thereof.

On April 26, 1974 (Exhibit 7), Gary L. Legg, President of Local 957, requested that Liberal pay retroactively the seventeen cent increase referred to in Finding 6. Liberal increased wages by the seventeen cents per hour effective May 1, 1974, with respect to work performed on or after such date, but refused to retroactively pay seventeen cents per hour for the period August 1, 1972, through April 30, 1974.

10. The prerequisites to a class action specified in Rule 23 (a) are all present in this case.

a. Since there are in excess of 100 members of the class, Joinder is impracticable;

b. The questions of law and fact are common to every member of the class since the determination of a collective bargaining agreement will affect all members of the class equally;

c. Plaintiff who is covered by the collective bargaining agreement has a claim;

d. Plaintiff was a member of Local 957 and was employed by Liberal at its warehouse in Dayton during the entire period of August 1, 1972, through April 30, 1974. There is no reason to believe that plaintiff's representation will be less than adequate;

e. In addition to satisfying the prerequisites of Rule 23 (a), the action also meets the requirements of Rule 23 (b) (1). Adjudication of this matter in this Court would dispose of similar claims by all other members of the class.

II

OPINION

At issue herein is the validity of a contract which in part contravenes an act of Congress. The law is clear that a contract in violation of a statute is unenforceable. *Massillon Savings & Loan Co.* v. *Imperial Finance Co.,* 114 Ohio St. 523. Where contractual consideration is partly legal and partly illegal a Court will enforce the agreement to the extent it conforms to the law. *Frederica* v. *Murray,* 45 Ohio Ops. 473.

An agreement legally valid at the time of execution may become void if while still executory it contravenes a subsequently enacted statute, *Massillon Savings & Loan Co.* v. *Imperial Finance Co., supra.*

The liability of parties under the Economic Stabilization Act remains after the expiration thereof. The General Savings Statute, 1 U.S.C. ¶109, prevents such expiration from acting as a legislative pardon for liability imposed by statute and regulation issued thereunder, *Fleming* v. *Mohawk Co.,* 331 U.S. 111, 119 (1947); *Great Northern Railway Co.* v. *United States,* 208 U.S. 453, 465 (1908).

The Economic Stabilization Act cannot be evaded by a promise to pay *in futuro.* Where, as here, the Decision and Order of the Cost of Living Council denies a wage increase, no device or scheme may be employed to evade such order. *United States* v. *International Brotherhood of Electrical Workers,* 475 F.2d 1204 (T.E.C.A. 1973).

III

CONCLUSIONS OF LAW

A. This Court has jurisdiction of this matter under the Economic Stabilization Act of 1970 §§ 210 and 211.

B. This matter is properly brought as a class action in accordance with Rule 23 of the Federal Rules of Civil Procedure.

C. A contract granting a wage increase violative in part of the wage controls of the Economic Stabilization Act of 1970 may not be enforced after the expiration of such act as to such violative portion.

D. The motion for summary judgment of plaintiff should be DENIED; the motion for summary judgment of defendant should be GRANTED.

LET JUDGMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX C

No. 75-1864

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEAN TAYLOR,
Plaintiff-Appellant,

vs.

LIBERAL MARKET, INC.,
Defendant-Appellee.

**Appeal From The United States District Court
For The Southern District of Ohio,
Western Division**

**PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC**

(Received March 9, 1976)

SIMPSON & LACHEY
Charles J. Simpson
300 Dayco Building
Dayton, Ohio 45402
Attorney for Plaintiff-Appellant

The Plaintiff-Appellant respectfully petitions the Court for a rehearing of the Court's decision of February 24,

1976, which affirmed the District Court's ruling that Defendant-Appellee was entitled to a summary judgment. The Plaintiff-Appellant further suggests to the Court that consideration by the full Court is necessary for the reason that this appeal involves a question of exceptional importance, to-wit, There are hundreds of collective bargaining agreements throughout the country similar to the one in question in the present case in which thousands of employers and employees are without guidance as to their rights and obligations in regard to wages lost during the wage control period.

It is difficult to ascertain what reasons the Court employed in affirming the lower Court's decision since this Court's decision is devoid of any discussion or reasoning of the issues. Plaintiff-Appellant is left to speculate as to the grounds upon which the Court based its decision.

This Court's decision was possibly based upon a finding that either the retroactive pay provisions in the collective bargaining agreement is illegal or that the payment now of such wages would constitute a violation of the Economic Stabilization Act. Appellant contends that neither of these grounds are correct statements and that the Court erred by affirming the lower Court's decision.

ARGUMENT

I. THE RETROACTIVE PAYMENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT ARE LEGAL AND ENFORCEABLE.

No where in the Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 note, is there a provision authorizing the President or any of his delegates to declare any wage agree-

ment illegal. There is no provision in the Act which can be construed to have any effect on an agreement by parties to do something at a time when the Act has no binding force or effect. The act merely authorized the suspension of the payment of wages during the effective period of the Act.

The present action was not filed until after the expiration of the Act and is not based on any act which occurred during the effective period of the act. It is based on Defendant-Appellee's refusal after the end of the wage freeze, wages which it had agreed to pay. Plaintiff-Appellant seeks only a declaratory judgment that the retroactive payment of wages now is not illegal.

II. PAYMENT AND RECEIPT OF WAGES RETROACTIVELY DOES NOT CONSTITUTE A VIOLATION OF THE ECONOMIC STABILIZATION ACT.

The payment now of wages lost during the wage and price control period would not be a violation of the Economic Stabilization Act, supra.

The Act expired by its terms on April 30, 1974 and thus the payment now could not be a violation of the Act. In the case of *United States* v. *California,* 504 F. 2d 750, (T.E.C.A. 1974), cert. denied, 43 U.S.L.W. 3643 (June 10, 1975), the Temporary Emergency Court of Appeals held that the payment after the expiration date of the act of wages lost during the wage control period is not a violation of the Act and that the government could prosecute the employer for making such retrocative payments.

CONCLUSION

For the foregoing reason Appellate requests an opportunity for a rehearing on these points. Because of the important nature of the question presented, it is requested that the rehearing be before the entire Court, sitting en banc.

Respectfully submitted,

/s/ CHARLES J. SIMPSON
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Rehearing and Suggestion for Rehearing en Banc was served upon R. Joseph Parker, 600 Dixie Terminal Building, Cincinnati, Ohio 45202 on this 9th day of March, 1976.

/s/ CHARLES J. SIMPSON

APPENDIX D

No. 75-1864

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEAN TAYLOR,
Plaintiff-Appellant,

vs.

LIBERAL MARKET, INC.,
Defendant-Appellee.

ORDER

(Filed April 6, 1976)

BEFORE: PECK, McCREE and LIVELY, Circuit Judges.

No judge in regular active service of the court having requested a rehearing en banc, the petition for rehearing in this case has been submitted to the panel which heard the appeal.

Upon consideration of the petition for rehearing the court concludes that a rehearing is not required. It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Supreme Court, U. S.
FILED
JUL 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1859

DEAN TAYLOR,

Petitioner,

v.

LIBERAL MARKET, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

R. JOSEPH PARKER
FORMAN FRIEND, JR.
600 Dixie Terminal Building
Cincinnati, Ohio 45202
Attorneys for Respondent

Of Counsel:

CHARLES D. LINDBERG
TAFT, STETTINIUS & HOLLISTER
600 Dixie Terminal Building
Cincinnati, Ohio 45202

ARNOLD I. SCHWARTZMAN
111 West First Street
Dayton, Ohio 45402

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1859

DEAN TAYLOR,

Petitioner,

v.

LIBERAL MARKET, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, Liberal Market, Inc., prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, made and entered on February 24, 1976, Motion for Rehearing Denied on April 6, 1976, is not officially reported, but is appended as Appendix A to the Petition for a Writ of Certiorari. The opinion of the United States District Court for the Southern District of Ohio, Western Division made and entered on May 14, 1975, is also not officially reported, but is appended to the Petition for a Writ of Certiorari as Appendix B.

JURISDICTION

Respondent respectfully submits that this Court does not have jurisdiction in this case under 28 U.S.C. § 1254(1) as asserted by Petitioner. For reasons set forth in Respondent's Memorandum in Support of the Motion to Dismiss Because of Lack of Jurisdiction, filed in the Court of Appeals on August 4, 1975, and appended hereto as Appendix A, this case was never properly in the court of appeals, and therefore this Court does not have jurisdiction under 28 U.S.C. § 1254(1).

In this case, which arose under the Economic Stabilization Act of 1970, as amended, 12 U.S.C.A. § 1904 note, the Sixth Circuit had no jurisdiction to entertain an appeal. *Municipal Intervenors Group* v. *Federal Power Comm'n*, 473 F.2d 84 (D.C. Cir. 1972). Appellate jurisdiction was exclusively vested in the Temporary Emergency Court of Appeals by section 211(b) of the Act, which provides:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

In *Municipal Intervenors Group* v. *Federal Power Comm'n*, *supra*, the court reasoned that although it normally had jurisdiction to review an order of the Federal Power Commission, the case arose under the Economic Stabilization Act of 1970, and therefore exclusive jurisdiction was in the United States District Court or, on appeal, in the Temporary Emergency Court of Appeals. It stated:

> This court, like the other United States courts of appeals, has been given no jurisdiction to decide or entertain review of such controversies. Appellate review authority is concentrated exclusively in a special court, the Temporary Emergency Court of Appeals, established as a national court of appeals in order to prevent the possibility of conflicting rulings by intermediate United States appellate courts, and danger to the anti-inflation program. *See*, [*sic*] Section 211(b) of the Economic Stabilization Act, as amended in 1971, 12 U.S.C. § 1904 note. (Supp. 1971). *Id.* at 89.

Accord, Municipal Elec. Utility Ass'n v. *Federal Power Comm'n*, 485 F.2d 967, 970 (D.C. Cir. 1973). *See also St. Mary's Hospital, Inc.* v. *Ogilvie*, 496 F.2d 1324, 1326 (7th Cir. 1974); *Structural Steel & Ornamental Iron Ass'n* v. *Shopmen's Local 545*, 478 F.2d 848 (3d Cir. 1973).

If an appeal is improperly brought in a United States Court of Appeals in a case arising under the Economic Stabilization Act of 1970, the only power which a court of appeals has is to dismiss the appeal; it has no power, either statutory or inherent, to transfer the appeal to the Temporary Emergency Court of Appeals. *See Municipal Intervenors Group* v. *Federal Power Comm'n*, *supra*. The Act makes no provision for the transfer of appeals. Instead Congress chose to confer exclusive jurisdiction on the special statutory court under 12 U.S.C.A. § 1904 note, § 211(b)(1). Petitioner has taken the position that the Economic Stabilization Act of 1970 expired by its terms at midnight, April 30, 1974, and that neihter the employer nor the employees are subject to sanctions after that date. Petitioner's Brief at 9. Respondent submits, however, that under the general savings statute, 1 U.S.C.A. § 109, and under § 218 of the Economic Stabilization Act, the District Director's Order of September 6, 1972, is still binding on the parties. The general savings statute provides in pertinent part:

> . . . The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper

> action or prosecution for the enforcement of such penalty, forfeiture, or liability.

I U.S.C.A. § 109. Section 218 of the Act further provides:

> The authority to issue and enforce orders and regulations under this title expires at midnight [*sic*] April 30, 1974, but such expiration shall not affect any action or pending proceeding, civil or criminal, not finally determined on such date, nor any action or proceeding based on any act committed prior to May 1, 1974. 12 U.S.C.A. § 1904 note, § 218.

Section 218 relates only to the ability of the courts to enforce orders and regulations and has no other effect on the competence or capacity of the Temporary Emergency Court of Appeals to hear appeals in other cases arising under the Act, such as in disputes between private parties. Thus, because this case was a private cause of action based upon an agreement controlled by the Act, exclusive appellate jurisdiction resided with the Temporary Emergency Court of Appeals.

The failure of Petitioner to file his appeal in the court which had jurisdiction precludes him from now seeking a writ of certiorari. This Court has the discretionary power to review all cases which are "in the courts of appeals." 28 U.S.C. § 1254. As a matter of long-standing precedent, the writ of certiorari will be denied where the case was not properly "in" the court below. In the leading case, Chief Justice Fuller said "[a]s the circuit court of appeals did not have jurisdiction, the application for certiorari must be denied." *Good Shot* v. *United States*, 179 U.S. 87 (1900). Refusal to take jurisdiction where jurisdiction of the Court below was lacking will be made *sua sponte* by this Court even in the absence of a showing by the parties. *Parker* v. *Ormsby*, 141 U.S. 81 (1891); *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U.S. 379 (1884). *Cf. United States* v. *Nixon*, 418 U.S. 683, 690-92 (1973) (Supreme

Court's jurisdiction under 28 U.S.C. § 1254 upheld where the case was properly "in" the court of appeals).

In summary, Respondent respectfully submits that the United States Court of Appeals for the Sixth Circuit erred in taking jurisdiction in this case, that the case was therefore not properly in that court, and that the judgment of the United States District Court for the Western District of Ohio remains binding. Hence, no jurisdiction exists under 28 U.S.C. § 1254 for the granting of a writ of certiorari.

QUESTIONS PRESENTED

Only if this Court finds that it has jurisdiction under 28 U.S.C. § 1254 are any questions presented for determination. Should the Court decide that it may take jurisdiction, only the following question would be presented:

> Whether enforcement of Article XV of the collective bargaining agreement between the Respondent and Petitioner's union would violate the Economic Stabilization Act of 1970.

Respondent submits that the answer is yes.

STATUTES INVOLVED

The relevant statutes and regulations are appended to this brief as Appendix B.

STATEMENT OF THE CASE

Petitioner's Statement of Facts is substantially correct. The parties entered into a Stipulation as to Facts prior to judgment which was filed on December 5, 1974, and is appended to this brief as Appendix C.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Decision of the Court of Appeals Is Not in Conflict with the Decisions of This Court or with the Decision

of the Temporary Emergency Court of Appeals in *United States* v. *California*, 504 F.2d 750 (T.E.C.A. 1974), *cert. denied*, 421 U.S. 1015 (1975).

Petitioner relies almost exclusively in his brief upon *United States* v. *California*, *supra*, which he asserts is inconsistent with the holding of the court of appeals in this case and should control. However, the instant case involves issues very different from those considered in the *California* case. *California* involved wages to be paid to public employees for work performed between July 1, 1973, and April 30, 1974, which wages were subject only to *voluntary, Phase III and Phase IV* guidelines. By contrast, the wages which are the subject of this case were and continue to be subject to *mandatory, Phase II* restriction. *Compare* Exec. Order No. 11,615, 36 Fed. Reg. 15,727 (Aug. 15, 1971); Exec. Order No. 11,627, 36 Fed. Reg. 20,139 (Oct. 16, 1971) (Phase I: general freeze of wages) [*and*] Exec. Order No. 11,627, *supra*, *as amended by* Exec. Order No. 11,640, *supra*, [*and*] Exec. Order No. 11,674, 37 Fed. Reg. 12,913 (June 30, 1972) (Phase II: mandatory controls) *with* Exec. Order No. 11,695, 38 Fed. Reg. 1473 (Jan. 12, 1973) [*and*] Exec. Order No. 11,730, 38 Fed. Reg. 19,345 (July 19, 1973) (Phases III and IV: voluntary controls). From August 1, 1972, through April 30, 1974, wages paid to employees in the food industry generally were subject to mandatory Phase II restrictions. 6 C.F.R. §§ 130.58(a) and 152.72(a).

Under Phase III and Phase IV guidelines employers in the voluntary sector could pay increases in excess of the guidelines without committing a violation of the Economic Stabilization Act. 6 C.F.R. §§ 130.11, 130.90 *et seq.*, 152.11 and 152.151. A violation occurred only where an excessive increase was challenged and denied by the Cost of Living Council and where the employer nevertheless implemented it. 6 C.F.R. § 152.151. By contrast, under Phase II restrictions it was illegal either to pay or to agree to pay compensation on a deferred basis in excess of that permitted under a Decision and Order of a District Director of the Internal Revenue Service. 6 C.F.R. § 201.41. Executive Order No. 11,640, § 1(a), 37 Fed. Reg. 1213 (Jan. 27, 1972), *as amended*, Exec. Order No. 11,660, 37 Fed. Reg. 6175 (Mar. 25, 1972), provided in relevant part:

> . . . No person shall, directly or indirectly, pay or agree to pay, in any transaction, wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.

Pursuant to Executive Order No. 11,640, which continued the existence of the Pay Board, the Pay Board issued regulations which also provided that deferred payments of compensation were illegal and subjected parties to sanctions, fines and penalties if in excess of allowed amounts. 6 C.F.R. § 201.41(a)(1), 37 Fed. Reg. 24,971 (Nov. 23, 1972). Under Section 201.41(b) it was not a violation of the Act to agree to compensation in excess of 5.5 percent. But once the determination had been made by the Internal Revenue Service disallowing the excess amount, then absent a contrary ruling from the Pay Board, it was illegal either to enter into an agreement, or to treat as effective an existing agreement to make retroactive payment of the disallowed amounts. In Pay Board Ruling 1972-92, it was held:

> . . . Section 201.41(a)(4) provides that it is a violation to "Fail or refuse to comply with a decision or order of the Pay Board or its delegate or with any regulation issued pursuant to the Act, or induce, solicit, encourage, force or require any other person to fail or refuse to comply with the decision or order of the Pay Board or its delegate or with any regulation issued

pursuant to the Act." This subsection makes clear that if the Board renders a decision, it is a violation for any person to refuse to comply with it.

Moreover, the language in § 201.41 providing that it shall not be a violation to "bargain for, request, contract for, or agree to (as contrasted with paying or receiving) a wage and salary increase in excess of the maximum permissible annual aggregate wage and salary increase" does not remove the basis for violation. This clause was included in § 201.41 to permit the parties to bargain freely prior to submitting their eventual agreement to the Pay Board for approval of an exception to the standard. Once the Board has decided that an agreement to pay an amount in excess of the standard constitutes an actual increase in wages and salaries, such an agreement no longer comes within the proviso permitting agreements in excess of the standards. The Board has ruled that it is more than an agreement—it is a wage and salary increase payable as deferred compensation. 37 Fed. Reg. 25,006 (Nov. 23, 1972).

Thus an agreement to pay disallowed amounts retroactive under Phase II as deferred compensation violated the Act.

California involved wages to be paid to public employees with respect to work performed during voluntary, Phase III and Phase IV guidelines. The different results which flowed from an agreement governed by Phase III and IV from one governed by Phase II is clearly explained by the cases. The same panel of the Temporary Emergency Court of Appeals that decided *California* also decided *United States* v. *Local 11, IBEW*, 475 F.2d 1204 (T.E.C.A. 1973). In *IBEW* a collective bargaining agreement was entered into between the collective bargaining representative of electrical workers in the Los Angeles area and the bargaining representative for an employers' association. The agreement provided for a wage and benefit increase to be effective on June 1, 1972, which was in excess of the amount

permissible under Phase II regulations. On April 26, 1972, a portion of the increase to be effective June 1, 1972, was approved. The representative of the electrical workers and certain of the employers entered into escrow agreements under which payments of the excess amounts were placed in escrow accounts to be released "at such times as they may legally do so." The representative of the electrical workers also filed for reconsideration of the decision. The decision was reaffirmed and the parties were notified that the escrow accounts were in violation of the applicable regulations and rulings. The United States sought an injunction which was granted, and the Temporary Emergency Court of Appeals affirmed the judgment, stating:

> If each party whose request for a wage increase was denied could circumvent the decision by requiring money to be paid in escrow, the integrity of the Stabilization Program would be seriously undermined. An escrow account would insure the creation of a sum of excess funds which, upon payment, could adversely effect [*sic*] the inflationary trend as soon as the controls are lifted.
>
> It is beyond dispute that in light of Pay Board Rulings No. 34 and No. 125, the appellant and other parties to the escrow agreements *paid and received a portion of the wage increase that had not been approved by C.I.S.C.* This resulted in the violation of 6 C.F.R. 201.17 (6 C.F.R. 201.41). 475 F.2d at 1208-09 (Emphasis added).

The court found that the provision in the escrow that payment should not be made until it was legal to do so did not save the agreement from being in violation of the Economic Stabilization Act and therefore was unenforceable.

The court in *California* was careful to draw the crucial distinction between Phase II controls, which were the subject of the *IBEW* case, and Phase III and IV guidelines, which were at issue in *California*:

. . . This superficial similarity between the cases disappears upon close examination. In *I.B.E.W.* the illegal escrow agreement was entered into *after* the negotiated wage increases had been disapproved; in this case the CLC [Cost of Living Council] did not challenge the proposed increases until after the State Budget Act had been enacted and was scheduled to be implemented. In *I.B.E.W.* it was illegal under the Phase II mandatory controls to pay *or to agree to pay* amounts higher than those specified in the regulations. In this case, the Phase III guidelines as to permissible wage increases were voluntary and adjustable for certain factors; the only way that the regulations could be violated was to pay an increase which had already been challenged and specifically disapproved by the agency. In *I.B.E.W.* there were official circulars and question-and-answer sheets published by the agency which clearly stated that escrow agreements of the type entered into by I.B.E.W. were illegal; in this case the increases legislated by California were permissible under the provisions of the Phase III regulations until they were later challenged and disapproved by the CLC. In summary, in *I.B.E.W.* the union violated mandatory controls and specific agency orders; in this case California, acting under voluntary controls, has admittedly violated no agency regulation or order. 405 F.2d at 756-57 (footnote omitted).

Once the distinction between the Phase II and Phases III and IV regulations, as applied to the facts of this case, is recognized, the conflict between this case and *California*, which Petitioner alleges to exist, becomes entirely illusory.

An equally fundamental difference between this case and *California* lies in the nature of the action. In *California* the court held that it lacked jurisdiction to consider an enforcement action brought by the federal government after the general expiration of economic controls. By contrast, in this action petitioner sought a declaration that article XV con-

stituted a valid and binding obligation of Liberal; in defense, Liberal has asserted that the District Director's Order rendered article XV null and void and not a binding obligation simply because of the general expiration of economic controls.

The *California* court plainly recognized the distinction between enforcement actions and those based upon alleged contractual rights. In examining the judical analysis of savings clauses in the Stabilization Act of 1942, the Emergency Price Control Act of 1942, and the Defense Production Act of 1950, the court highlighted the word "enforcement" three times and the phrase "to enforce" once. 504 F.2d at 753, 754.

Section 218 is limited by its terms to enforcement actions: "*The authority to . . . enforce . . . expires* at midnight [*sic*] April 30, 1974, but. . . ." (emphasis added). The general expiration provided under section 218 does not affect the right of a party to a contract to assert the defense of illegality. *See De La Rama S.S. Co.* v. *Pierson*, 174 F.2d 84 (9th Cir. 1949). In *De La Rama* the general manager of a steamship company sued his employer alleging an oral promise to pay additional compensation upon the termination of World War II and the expiration of wage and salary controls. The employer denied the existence of this oral promise and further asserted the defense of illegality under the Stabilization Act of 1942, ch. 578, 56 Stat. 765 (the "1942 Act"). In finding for the employer, the court rejected the assertion of the plaintiff that promises to pay additional compensation after the expiration of salary controls were not regulated by the 1942 Act and held that such promises represented illegal "additional compensation." 174 F.2d at 88.

The promise of Liberal set forth in article XV of the agreement but rendered null and void by the District Director's Order is identical in intent and effect to the

promise condemned by the court in *De La Rama*. The *California* holding is limited, therefore, to enforcement actions brought subsequent to April 30, 1974, involving wages paid with respect to work performed during the period of voluntary controls (*i.e.*, Phases III and IV except for firms in the food, health or construction industries). Because this case is concerned with wages paid with respect to work performed during the period of mandatory controls and because it involves a promise to pay wages in excess of that permitted under the terms of a binding agency order, *IBEW* clearly controls.

II. The Court of Appeals Properly Held That Enforcement of the Agreement Would Violate the Economic Stabilization Act of 1970.

Having been granted a summary judgment in the district court which was affirmed with a motion for rehearing denied by the court of appeals, Respondent makes no attempt to reargue in this brief in opposition to the petition all of the arguments made by the Respondent below. By way of summary, however, it is the Respondent's belief that the interpretation of the Economic Stabilization Act of 1970 upheld below and in *IBEW* and *California* is the only correct statutory construction possible. If Petitioner's statutory interpretation were accepted, parties could always avoid the effect of any wage or price stabilization statute by agreeing privately to defer unlawful payments until the statute's expiration. In this case, a deferred or retroactive payment would defeat the fundamental purpose of the Economic Stabilization Act—the control of inflation by limiting the size of wage and price increases.

The Agreement in this case became effective on August 1, 1972, during Phase II mandatory controls. Moreover, because Liberal was considered a firm in the food industry, its employees were subject to mandatory economic regulation through April 30, 1974. A violation of the Phase II regulations would result if, after receipt of the District

Director's Order, Liberal and Local 957 treated Article XV as a valid, binding and enforceable obligation of Liberal to make retroactive payments. Therefore, although payments would be made after April 30, 1974, they are treated under the Act as if paid during the year in which the services were rendered for which the employees are paid. *United States* v. *Local 11, IBEW, supra.*

The Pay Board Rulings relied on by the court in *IBEW* make clear the Pay Board's position that provisions for retroactive payments are treated as payments made and received in the year in which the services are rendered and, therefore, are in violation of Regulation § 201.41. 475 F.2d at 1207, nn. 5 and 6. *See also* Pay Board Ruling No. 1972-92, *supra.*

If payments are now made under Article XV of the agreement, the payments will be treated as "paid and received" in the year during which the services rendered for such payments occurred, *i.e.*, prior to May 1, 1974. Under § 218 of the Act, Liberal, Local 957 and its members could be subject to sanctions if payments were now made under Article XV. Accordingly, Article XV constitutes an illegal promise and is unenforceable under Ohio law. *Massillon Savings & Loan Co.* v. *Imperial Finance Co.*, 114 Ohio St. 523, 151 N.E. 645 (1926). *Accord, Nahas* v. *George*, 156 Ohio St. 57, 99 N.E.2d 898 (1951); Restatement of Contracts § 609 (1932).

Because the courts have correctly decided the central and peripheral issues raised by Petitioner, no questions of great public importance or federal law are in need of resolution by this Court. The United States courts of appeals have already correctly and uniformly held that agreements to make retroactive payment of wages in excess of those permitted under mandatory wage controls were unlawful under the Economic Stabilization Act. As the cases discussed above indicate, the Act has received a thorough, uniform and correct judicial treatment. Petitioner has

failed to show that the absence of a ruling by this Court has caused or will cause "thousands of employees and employers across our nation" to be "without guidance as to their respective rights and obligations." Petitioner's Brief at 6. On the contrary, the law is correctly settled and no conflict exists between or among circuits.

CONCLUSION

It is respectfully submitted that Petitioner has failed to sustain his burden under Rule 19 that there are special and important reasons that the writ of certiorari should be granted. The application of the Act by the court below did not involve questions of federal law which have not been, but should be settled by this Court. Nor has the court of appeals decided a federal question in a way to conflict with applicable decisions of this Court or another court of appeals on the same issue. The court of appeals correctly affirmed the judgment of the district court. Wherefore Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

R. JOSEPH PARKER

FORMAN FRIEND, JR.
600 Dixie Terminal Building
Cincinnati, Ohio 45202
(513) 381-2838
Attorney for Respondent

Of Counsel:

CHARLES D. LINDBERG
TAFT, STETTINIUS & HOLLISTER
600 Dixie Terminal Building
Cincinnati, Ohio 45202

ARNOLD I. SCHWARTZMAN
111 West First Street
Dayton, Ohio 45402

AFFIDAVIT OF SERVICE

STATE OF OHIO
COUNTY OF HAMILTON } SS:

The undersigned, being first duly sworn, deposes and says that he is attorney of record for Respondent, The Liberal Market, Inc., and that on behalf of Respondent he served on July 21, 1976, three copise of the foregoing Brief for Respondent in Opposition to the Petition for Certiorari upon Charles J. Simpson, Attorney for Petitioner, 300 Dayco Building, 333 West First Street, Dayton, Ohio 45402 by depositing the same in a United States mail box, with first-class postage prepaid.

R. JOSEPH PARKER

Sworn to and subscribed before me, a notary public for the State of Ohio, on this 21st day of July, 1976.

FORMAN FRIEND, JR.
Notary Public
My commission does not expire.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 75-1864

DEAN TAYLOR,

Plaintiff-Appellant,

v.

LIBERAL MARKET, INC.,

Defendant-Appellee.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BECAUSE OF LACK OF JURISDICTION

I. THE CASE

This action was commenced by the filing of a Complaint in the United States District Court for the Southern District of Ohio on August 22, 1974. A copy of the Complaint is attached hereto as Exhibit A. Plaintiff and defendant submitted a joint Stipulation As To Facts and both moved for Summary Judgment. On May 16, 1975, judgment was entered for defendant-appellee dismissing the action.

Plaintiff-appellant filed a Notice of Appeal with the District Court on June 12, 1975, and the appeal was docketed on July 21, 1975.

The case is now before this Court on the motion of defendant-appellee to dismiss because of lack of jurisdiction.

II. JURISDICTIONAL FACTS

The following facts are taken from the Findings of Fact, Opinion and Conclusions of Law of the District Court

docketed May 14, 1975. [Exhibit reference omitted]

Plaintiff-appellant, Dean Taylor, is, and has at all relevant times been, an employee of defendant-appellee, The Liberal Market, Inc. (hereinafter "Liberal"). Teamsters Local 957 is the bargaining representative for Liberal's warehouse employees, classified as Freezermen, Drivers, Lead Men, Lift Operators, Warehousemen or Warehouse Porters (hereinafter "warehousemen"). Mr. Taylor is, and has at all relevant times been, a member of that bargaining unit and a member of Local 957. Findings of Fact ¶ 1.

Liberal is a firm in the retail food industry with its offices and principal place of business in Dayton, Ohio. Findings of Fact ¶ 2.

On August 5, 1972, Liberal and Local 957 entered a collective bargaining agreement effective August 1, 1972, through July 31, 1975. The agreement was entered at a time when "Phase II" of economic controls was in effect. Certain wage benefits provided in the collective bargaining agreement were in excess of the maximum allowable under the regulations in effect during Phase II. On August 21, 1972, Liberal's Director of Personnel submitted an exception request on behalf of Liberal, Local 957 and the warehousemen to the District Director of the Internal Revenue Service requesting permission to implement the wage provisions which were in excess of the regulations. On September 6, 1972, the District Director denied the request. No appeal was filed from that decision. Findings of Fact ¶ 3-6.

On May 1, 1974, the Economic Stabilization Act insofar as it controlled wages for work performed after that date, expired by its terms. 12 U.S.C.A. § 1904 note § 218. A demand was made by the president of Local 957 that the

wages which had been disallowed by the District Director be paid retroactively pursuant to Article XV of the collective bargaining agreement which provided:

> If any proposal submitted by the Union, if granted, may not be put into effect because of applicable legislation, Executive Orders or Regulations dealing with Wage and Price Stabilization, then such proposals, or any part thereof, including any retroactive requirement thereof, shall become effective at such time, in such amounts, and for such periods, retroactively and prospectively, as will be permitted by law at any time during the life of this Agreement and any extension thereof.

Liberal refused to retroactively pay the disallowed wages. Findings of Fact ¶ 9.

On August 22, 1974, plaintiff, Dean Taylor, individually and as a representative of the class consisting of the members of Local 957, instituted an action seeking declaratory relief that the wage and price controls under the Economic Stabilization Act of 1970 were no longer binding upon the wages claimed to be retroactively due to plaintiff and those similarly situated. Jurisdiction of the Court was alleged to be based on section 210 of the Economic Stabilization Act of 1970 as amended by Public Law 92-210 (December 22, 1971), 85 Stat. 743, 12 U.S.C. § 1904 note. Complaint ¶ 2. Judgment was entered in defendant's favor on May 14, 1975. The District Court found that it had jurisdiction under the Economic Stabilization Act of 1970 §§ 210 and 211. Conclusions of Law ¶ A.

III. ISSUE

The issue presented by this Motion is whether the United States Court of Appeals for the Sixth Circuit has jurisdiction of an appeal from an action arising under the Economic Stabilization Act of 1970.

IV. ARGUMENT

The United States Court of Appeals for the Sixth Circuit Does Not Have Jurisdiction Over This Action Arising Out of the Economic Stabilization Act of 1970.

Ordinarily the United States Court of Appeals has jurisdiction over appeals from judgments of the United States district courts sitting within its Circuit. 28 U.S.C.A. §§ 1291, 1294. The Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 note, however, creates an exception to the jurisdictional grant. Section 211(b) of the Act creates a Temporary Emergency Court of Appeals which has exclusive jurisdiction over such appeals. Section 211(b)(2) provides:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

The United States Court of Appeals has no jurisdiction to entertain an appeal from a judgment arising under the Act. *Municipal Intervenors Group* v. *Federal Power Commission*, 473 F.2d 84 (D.C. Cir. 1972). In that case, a petition to review an order of the Federal Power Commission was filed with the United States Court of Appeals for the District of Columbia Circuit. The order appealed from permitted increases in natural gas rates after finding that those increases were "consistent with the purposes of the Economic Stabilization Act of 1970." The Court held that it lacked jurisdiction to entertain the petition. It reasoned that although it normally had jurisdiction to review an

order of the Federal Power Commission, the case arose under the Economic Stabilization Act of 1970, and, therefore, exclusive jurisdiction was in the United States District Court or the Temporary Emergency Court of Appeals. It stated:

> This court, like the other United States courts of appeals, has been given no jurisdiction to decide or entertain review of such controversies. Appellate review authority is concentrated exclusively in a special court, the Temporary Emergency Court of Appeals, established as a national court of appeals in order to prevent the possibility of conflicting rulings by intermediate United States appellate courts, and danger to the anti-inflation program. *See*, Section 211(b) of the Economic Stabilization Act, as amended in 1971, 12 U.S.C. § 1904 note. (Supp. 1971). *Id.* at 89.

See Municipal Electric Utility Assoc. of Alabama v. *Federal Power Commission*, 485 F.2d 967, 970 (D.C. Cir. 1973), in which a panel including Judge Edwards of the Sixth Circuit refused to consider contentions in the petition which raised issues under the Economic Stabilization Act. Other courts have indicated a view consistent with the District of Columbia Circuit. *See St. Mary's Hospital of East St. Louis, Inc.* v. *Ogilvie*, 496 F.2d 1324, 1326 (7th Cir. 1974) (allegations of jurisdiction under the Act must appear in complaint); *cf. Structural Steel And Ornamental Iron Assoc. of New Jersey* v. *Shopmen's Local Union No. 545*, 478 F.2d 848 (3rd Cir. 1973) (Court of Appeals had jurisdiction of appeal from District Court because it was not called on to decide issues under the Act).

If an appeal is improperly brought in a United States Court of Appeals in a case arising under the Economic Stabilization Act of 1970, the only power which the Court of Appeals has is to dismiss the appeal; it has no power to transfer the appeal to the Temporary Emergency Court of

Appeals because there is neither statutory authorization to do so nor is there any inherent power to do since the Court of Appeals has no jurisdiction. For example, in *Municipal Intervenors Group* v. *Federal Power Commission, supra,* the Court dismissed the petition because of lack of jurisdiction; it did not transfer the case although the case could have been properly brought in the District Court.

An example of statutorily authorized transfer is *Metsch* v. *United States*, 493 F.2d 1232 (Ct. Cl. 1974), in which the Court of Claims transferred a case arising under the Economic Stabilization Act to a United States district court pursuant to the express statutory authority contained in 28 U.S.C.A. § 1506 which provides for transfers of cases over which the district courts have "exclusive jurisdiction . . . to any district court in which it could have been brought at the time such case was filed. . . ." There is, however, no statutory authority for a United States Court of Appeals to transfer a case to the Temporary Emergency Court of Appeals.

Not only is there no statutory grant of power to transfer a case to the Temporary Emergency Court of Appeals but the present case is not a situation in which the Court has inherent power to transfer the case. The concept of inherent power has developed as a means of transferring cases where more than one circuit has jurisdiction over a case. For example, in *Pacific Gas & Electric Co.* v. *Federal Power Commission*, 106 U.S. App. D.C. 281, 272 F.2d 510 (D.C. Cir. 1958), the first case found explicitly recognizing the concept of inherent power, a transfer between Circuits was permitted where the Federal Power act allowed orders of the FPC to be reviewable only via filing in certain Circuits of the United States Court of Appeals. In denying a motion to return a case to the Ninth Circuit which had been transferred, the Court stated:

> It is our view that the Court of Appeals for the *Ninth Circuit had jurisdiction* to review the order by reason of the timely petition for review filed in that court. However, we think that court had inherent power based on sound principles of judicial administration to transfer the case to this court, and upon the transfer, we were invested with jurisdiction over the petition. To save judicial time, to maintain continuity in the total proceeding, and because our prior order is involved, we decline to transfer the record back to the Ninth Circuit and will exercise our jurisdiction over the petition. *Id* at 511 (emphasis added).

Although inherent power to transfer has been consistently recognized by the Circuits, this power has been recognized only as to transfers to other United States Courts of Appeals when both Circuits had jurisdiction. The most recent example of an exercise of the inherent power to transfer is found in *Dayton Power & Light Co.* v. *Environmental Protection Agency*, Case 74-2997 (6th Cir. June 16, 1975), in which this Court transferred petitions for review to the District of Columbia Circuit. But, if a court does not have jurisdiction over a case, it has no inherent power to transfer the case to another court. For example, the Court in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 343 F.2d 905, 908 (8th Cir. 1965), stated:

> Lack of venue is quite different than lack of jurisdiction. A court without jurisdiction has no power to adjudicate but can only dismiss the proceeding for lack of jurisdiction. Jurisdictional defects cannot be waived. Venue may be and frequently is waived.

This is not a case in which Congress made a general grant of jurisdiction to the Courts of Appeals but limited venue to particular Circuits as in the cases discussed above. On

the contrary, Congress chose to confer jurisdiction exclusively on the Temporary Emergency Court of Appeals, a special statutory court created under the provisions of 12 U.S.C.A. § 1904, note § 211(b)(1). The Temporary Emergency Court of Appeals is not a sister Court of Appeals to the Sixth Circuit sharing jurisdiction over the same cases as might Circuits of the United States Court of Appeals. The Sixth Circuit has no jurisdiction over an appeal arising under the Economic Stabilization Act and, therefore, no power to transfer such an appeal to a court having jurisdiction. Consequently, this case is almost identical to *Municipal Intervenors Group* v. *Federal Power Commission, supra,* in which the court, having found that it lacked jurisdiction, dismissed the case.

V. CONCLUSION

It is undisputed in the present case that this action arises under the Economic Stabilization Act of 1970. Exclusive jurisdiction of the appeal from the judgment of the District Court is vested in the Temporary Emergency Court of Appeals. This Court is without jurisdiction and should enter an order dismissing the appeal.

Respectfully submitted,

/s/ R. JOSEPH PARKER
R. JOSEPH PARKER
Attorney for Defendant-Appellee

Of Counsel:

CHARLES D. LINDBERG
FORMAN FRIEND, JR.
TAFT, STETTINIUS & HOLLISTER
600 Dixie Terminal Building
Cincinnati, Ohio 45202

APPENDIX B

I. Statutes:

1 U.S.C.A. § 109:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, for forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

12 U.S.C.A. § 1904 note (the Economic Stabilization Act of 1970) (excerpts):

§ 201. Short title

This title ma be cited as the 'Economic Stabilization Act of 1970'.

§ 202. Findings

It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize prices, rents, wages, salaries, dividends, and interest, and that in order to maintain and promote competition in the petroleum industry and assure sufficient supplies of petroleum products to meet the essential needs of various sections of the Nation, it is necessary to provide for the rational and equitable distribution of those products. The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government. The President is in a position to

implement promptly and effectively the program authorized by this title.

§ 203. Presidential authority

(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—

(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title;

* * * *

§ 204. Delegation

The President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he deems appropriate, or to boards, commissions, and similar entities composed in whole or in part of members appointed to represent different sectors of the economy and the general public. Members of such boards, commissions, and similar entities shall be appointed by the President by and with the advice and consent of the Senate;

* * * *

§ 208. Sanctions; criminal fine and civil penalty

(a) Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000 for each violation.

(b) Whoever violates any order or regulation under this title shall be subject to a civil penalty of not more than $2,500 for each violation.

§ 209. Injunctions and other relief

Whenever it appears to any person authorized by the President to exercise authority under this title that

any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

§ 210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

* * * *

§ 211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy: except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceedings an issue by way of defense is raised based on the con-

stitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28].

* * * *

§ 218. Expiration

The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1974, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1974.

Stabilization Act of 1942, ch. 578, § 5, 56 Stat. 767:

(a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.

(b) Nothing in this Act shall be construed to prevent the reduction by any private employer of the salary of any of his employees which is at the rate of $5,000 or more per annum.

(c) The President shall have power by regulation to limit or prohibit the payment of double time except when, because of emergency conditions, an employee is required to work for seven consecutive days in any regularly scheduled work sheet.

II. Regulations:

6 C.F.R. § 130.1 (excerpt):

(a) This part supersedes the provisions of Part 101 and Chapters II (Pay Board Regulations) and

III (Price Commission Regulations) of this title, except insofar as hereinafter provided with respect to the food industry, the health industry, and the construction industry. However, the provisions of Chapters II and III of this title serve as a guide in applying the general price and pay standards set forth in Subpart B of this part, and except as provided in § 130.7.

(b) Reports due under prior rules: Any report required to be filed with the Pay Board or the Price Commission under the provisions of Chapters II and III or any rule, order or regulation of the Pay Board or Price Commission in effect on January 10, 1973 for any reporting period which ended on or before that date and which was not filed by that date, shall be filed with the Council in the form and within the time in which it would have been filed with the Pay Board or the Price Commission.

(c) Renegotiation provisions in price, rent, wage, or salary contracts which depend for their operation upon the modification or termination of the Economic Stabilization Program are hereby declared inoperative as unreasonably inconsistent with the goals of the Economic Stabilization Program. This part shall not operate to permit:

(1) A retroactive increase in prices, rents, wages or salaries for goods or services sold or leased or work performed while the prices, rents, wages, or salaries were subject to the rules of the Price Commission or the Pay Board, or

(2) A prospective increase in prices, rents, wages, or salaries under the terms of a contract subject to a Price Commission or Pay Board decision and order, except to the extent consistent with such decision and order.

* * * *

6 C.F.R. § 130.11:

This subpart establishes standards for private behavior which are intended to be applied voluntarily

and on a self-administered basis and which are consistent with achieving the national goals of the economic stabilization program. The standards do not apply to price adjustments in the food industry, the health services industry, or the construction industry, to rate adjustments by public utilities, or to pay adjustments affecting employees in the food industry, the health services industry, or the construction industry.

6 C.F.R. § 130.58(a):

Pay adjustments affecting employees in the food industry remain subject to the classification, prenotification, and reporting requirements of the Council and the rules and regulations of the Pay Board in effect on January 10, 1973, with respect to such pay adjustments put into effect prior to 9 p.m., E.S.T., March 29, 1973. After such time, the classification, prenotification, and reporting requirements set forth in § 130.58a, together with such rules and regulations of the Pay Board not inconsistent therewith, shall apply to such pay adjustments. The Council shall succeed to and assume all applicable rights, duties, and obligations of the Pay Board contained in the regulations of the Pay Board in effect on January 10, 1973. When ever authorizations from or reports to the Pay Board or the Council, as appropriate, are required under the appropriate rules and regulations, such authorizations shall be obtained from and reports made to the Council in the form and within the time required under such appropriate rules and regulations.

6 C.F.R. § 152.11:

This subpart establishes standards for private behavior which are intended to be applied voluntarily and on a self-administered basis and which are consistent with achieving the national goals of the economic stabilization program. The standards do not apply to pay adjustments affecting employees in the

food industry, the health services industry, or the construction industry.

6 C.F.R. § 152.72(a):

Pay adjustments affecting employees in the food industry remain subject to the classification, prenotification, and reporting requirements of the Council and the rules and regulations of the Pay Board in effect on January 10, 1973, with respect to such pay adjustments put into effect prior to 9 p.m., E.S.T., March 29, 1973. After such time, the classification, prenotification, and reporting requirements set forth in this subpart, together with such rules and regulations of the Pay Board not inconsistent therewith, shall apply to such pay adjustments. The Council shall succeed to and assume all applicable rights, duties, and obligations of the Pay Board contained in the regulations of the Pay Board in effect on January 10, 1973. Whenever authorizations from or reports to the Pay Board or the Council, as appropriate, are required under the appropriate rules and regulations, such authorizations shall be obtained from and reports made to the Council in the form and within the time required under such appropriate rules and regulations.

6 C.F.R. § 152.151:

(a) In general. Except as provided in paragraph (b) of this section, it shall be a violation of the provisions of this title, subject to the sanctions, fines, penalties, and other relief provided in the Act, for any person to engage in any act, conduct, or attempt which constitutes a means to pay or receive a wage or salary higher than that permitted by the regulations in this part. Such prohibited conduct includes any act, conduct, or attempt by any person to:

(1) Payment or receipt of pay adjustments subject to mandatory controls. Pay or receive, directly or indirectly, immediately or on a deferred basis, any wage or salary increase with respect to employees

subject to mandatory controls that exceeds a wage or salary increase authorized under the provisions of this part or approved in a decision and order of the Council.

(2) Payment or receipt of pay adjustments subject to self-administration. Pay or receive, directly or indirectly, immediately or on a deferred basis, any wage or salary increase with respect to employees subject to the provisions of Subpart B of this part, that is prohibited under the provisions of this part, or is in excess of an increase approved in a decision and order of the Council.

(3) Accessorial acts or attempts. Induce, solicit, encourage, force, or require, or attempt to induce, solicit, encourage, force, or require, any other person to pay or to receive, directly or indirectly, any portion of a wage or salary increase not authorized under the mandatory control provisions of this part or approved in a decision and order of the Council.

(4) Compliance. Fail or refuse to comply with a decision and order of the Council or with any regulation issued pursuant to the Act, or induce, solicit, encourage, force, or require any other person to fail or refuse to comply with any decision and order of the Council, or with any regulation issued pursuant to the Act.

(5) Executive or variable compensation. Pay, award, grant, receive, accept, establish, or make changes in any item of executive or variable compensation without timely filing of such notices or reports or receiving approval thereof to the extent required by the provisions of this chapter and Chapter II of this title.

(6) Forbearance of rights. Force or require any party at interest (as defined in § 201.2 of this title) to refrain or forbear from filing a pay challenge, request for exception, request for interpretation or ruling, prenotification, report, appeal, motion for reconsideration, or any other document or information

permitted or required to be filed with the Council, or to force or require any party at interest to withdraw any such document already filed.

(7) Filings. Fail or refuse to file on a timely basis any prenotification, report, or other document required by the regulations issued pursuant to the Act.

(8) Notices of challenge and temporary orders. Fail or refuse to comply with a notice of challenge and temporary order issued by the Council requiring that a person suspend or halt the conduct being challenged.

(9) Final orders. Fail or refuse to comply with a final order issued by the Council pursuant to § 152.57 that prescribes, prohibits, or limits the payment or receipt of any wage or salary increase.

(b) Excepted acts—(1) Agreements for wage and salary increases. Notwithstanding the provisions of paragraph (a) of this section, it shall not be a violation to bargain for, request, contract for, or agree to (as contrasted with paying or receiving) a wage or salary increase in excess of the standard.

(2) Limitation on excepted acts. The exception provided in paragraph (b) (1) of this section shall not apply in any situation where the Council has denied an appeal from a determination by the Internal Revenue Service, or rendered a decision on a pay challenge, request for an exception, or other submission.

6 C.F.R. § 201.41 (excerpt):

(a) In general. Except as provided in paragraph (b) of this section, it shall be a violation of the provisions of this chapter, subject to the sanctions, fines, penalties, and other relief provided in the Act, for any person to—

(1) Payment. Pay, directly or indirectly, immediately or on a deferred basis, any portion of a wage and salary increase not authorized by the provisions of this chapter or by decision or order of the Pay Board or its delegate;

(2) Receipt. Receive or accept, directly or indirectly, any portion of a wage and salary increase not authorized by the provisions of this chapter or by decision or order of the Pay Board or its delegate;

(3) Accessorial acts or attempts. Induce, solicit, encourage, force, or require, or attempt to induce, solicit, encourage, force or require, any other person to pay or to receive, directly or indirectly, any portion of a wage and salary increase not authorized by the provisions of this chapter or by decision or order of the Pay Board or its delegate;

(4) Compliance. Fail or refuse to comply with a decision or order of the Pay Board or its delegate or within any regulation issued pursuant to the Act, or induce, solicit, encourage, force, or require any other person to fail or refuse to comply with a decision or order of the Pay Board or its delegate, or with any regulation issued pursuant to the Act;

(5) Executive or variable compensation. Pay, grant, award, receive, accept, establish, or make changes in any item of executive or variable compensation without timely filing of such notices or reports or receiving approval thereof as required by the provisions of this chapter;

(6) Forbearance of rights. Force or require any party at interest (as defined in § 201.2) to refrain or forbear from filing a pay challenge, request for exception, request for interpretation or ruling, prenotification, report, appeal, motion for reconsideration, or any other document or information permitted or required to be filed with the Pay Board or its delegate, or to force or require any party at interest to withdraw any such document already filed;

(7) Filing. Fail or refuse to file on a timely basis any prenotification, report, certification, or other document required by regulations; or

(8) Submission of information. Fail or refuse to submit on a timely basis to the Pay Board, or its delegate, information within the knowledge or control of

a person, if the Board has required or ordered that person to submit such information after determining such information is relevant to the disposition of any matter affecting such person before the Board.

(b) Excepted acts—(1) Agreements for wage and salary increases. Notwithstanding the provisions of paragraph (a)(3) of this section, it shall not be a violation to bargain for, request, contract for, or agree to (as contrasted with paying or receiving) a wage and salary increase in excess of the maximum permissible annual aggregate wage and salary increase.

(2) Limitation on excepted acts. The exception provided in subparagraph (1) of this paragraph shall not apply in any situation where the Pay Board has denied an appeal from a determination by the Internal Revenue Service, or rendered a decision on a pay challenge or request for an exception.

(c) Illustrations. The provision of paragraphs (a) and (b) of this section may be illustrated by the following examples:

* * * *

Example (5). Assume the same facts as in Examples (1) and (4) except that the terms of the escrow agreement provide that disapproved amounts shall continue to be paid into the fund and shall be paid out to the employees upon the relaxation or cessation of economic controls or when otherwise legally allowable. Since the terms of the escrow agreement provide for beneficial ownership by the employees of the escrowed amounts, such amounts constitute deferred compensation for services rendered in the control year such amounts are paid into escrow. Continued payment of such amounts by Employer A after a disallowance by the Pay Board results in a violation of the provisions of this chapter by all parties at interest to the agreement.

* * * *

Appendix B

Example (7). On May 15, 1972, Employer C put into effect a 5.5 percent increase in the base compensation rate for a 100 member appropriate employee unit not covered by a collective bargaining agreement. On that date Employer C also communicated a promise to pay each employee a bonus of $500 upon the relaxation or cessation of economic controls. Employer C has not filed a request for exception with respect to the promise to pay each employee a $500 bonus. Since the promise to pay such bonus is an increase in wages and salaries in the form of deferred compensation. Employer C is in violation of the provisions of this chapter. Similarly, a violation would occur if the employees of Employer C were covered by the terms of a collective bargaining agreement and such agreement provided for the bonus.

6 C.F.R. § 205.21:

Any person aggrieved by an action of IRS or the Office of the Chief Counsel for the Internal Revenue Service taken or issued pursuant to Part 401 of this title, or in accordance with delegated authority, may file an appeal with the Board, provided that a determination of violation may not be the subject of an appeal.

6 C.F.R. § 205.23:

Before filing an appeal under this subpart, a recipient of an adverse action by a District Director must have exhausted his administrative remedies within IRS by filing a timely appeal within IRS as permitted by § 401.601 of this title. An appeal to the Board must be filed with the appropriate IRS official within 30 days of service by IRS of the adverse action upon which the appeal is based.

6 C.F.R. § 205.25:

(a) The Board will determine whether an appeal makes a prima facie showing that the adverse action—

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(1) Was erroneous in fact or in law; or

(2) In the case of a decision denying a pay adjustment, was erroneous in fact or in law or appears to be otherwise inequitable.

6 C.F.R. § 205.29:

(a) Any person aggrieved by a determination under § 205.25(a) (2) or by the Board's decision under § 205.28, with respect to a pay adjustment, may request review within 14 days of service of such determination or decision.

(b) The procedural regulations contained in §§ 205.34 through 205.40 (relating to reviews) are generally adopted with respect to this subpart.

6 C.F.R. § 205.34:

(a) The Board will review the approval or the denial of a pay adjustment if the request for review makes a prima facie showing that—

(1) The initial action was erroneous in fact or in law or

(2) It appears to be otherwise inequitable.

(b) If the Board determines that the request for review failed to make a prima facie showing, the Board may summarily reject the request for review, notify the applicant and other parties at interest of its action, and advise the applicant that he has exhausted his administrative remedies and that he may seek judicial review under the Act.

(c) If the Board determines that the request for review has made a prima facie showing, it will proceed in accordance with the provisions of §§ 205.39 and 205.40.

6 C.F.R. § 401.602:

Any appeal referred to in § 401.601 shall be filed with the district director whose office processed the determination appealed from within 30 days of—

(a) The service of the administrative determination causing the person to be aggrieved, or

(b) The service of the interpretation referred to in such section.

6 C.F.R. § 401.603:

Every appeal shall set forth:

(a) The name, address, and identifying number of the appellant,

(b) A copy of the interpretation,

(c) A clear and concise statement of all objections raised by the appellant against the provision or provisions objected to, and

(d) Whether or not a conference is desired.

The appellant must also include with his appeal a statement of his views as to the effect of economic stabilization regulations and guidelines upon the subject act or transaction and furnish a statement of relevant authorities to support such views.

6 C.F.R. § 401.605:

A decision of a district conferee pursuant to §401.604 shall be deemed a final action by the Internal Revenue Service and may be appealed to the Cost of Living Council, Pay Board, or Price Commission, as appropriate, to the extent an appeal is otherwise allowable under the provisions of this title.

III. Pay Board Rulings:

No. 1972-32:

Facts. Employer X and union representing its employees execute an agreement after November 14, 1971 which provides for a 9-percent increase in wages and fringe benefits, effective May 1, 1972. It further provides that, in the event that any portion of the increase is denied by the Pay Board, when controls are lifted and when it becomes legally permissible to do so, the parties will agree upon such supplemental wage provision as will provide the full worth of the negotiated increase partially denied.

Issue. Does the above provision for a deferred increase constitute an increase in wages and salaries chargeable against the standard specified in § 201.10?

Ruling. Yes. Section 201.3 of the Pay Board's regulations defines wages and salaries as including "all forms of direct and indirect remuneration or inducement to employees * * *, which are reasonably subject to valuation including * * * deferred compensation * * *." Section 201.10 further provides that the standard "* * * shall apply to any wage and salary increase payable * * * pursuant to an employment contract entered into * * * after November 14, 1971."

The deferred increase constitutes an obligation to pay, effective on the date of agreement, a 9 percent increase, pursuant to a current contract. The agreement on its face, provides that the portion of the increase disallowed by the Pay Board will be paid as consideration for work currently being performed. Unlike a contract which might provide for an increase during the second year of its term as consideration for work performed during that second year, this provision expressly provides that the future payment will be in consideration for work performed during the first year of the contract. In effect, it is deferred compensation for work performed currently. As such it is a form or remuneration. (It is also a present additional "inducement" to employees, since they know that when controls are lifted they will be paid an increased amount for work being performed today.)

Furthermore, it is "reasonably subject to valuation." This term does not require precise measurement but rather some reasonable criteria by which a value can be placed on the form of remuneration. When a present value is placed on the deferred increase, it will be added to the increase permitted by the Board. Since this will exceed the permissible increase, the deferred compensation will probably be prohibited.

Criteria which could be used to arrive at a present valuation would include:

(1) An assumption that May 1, 1973, the present statutory expiration date of controls, would be the date when the contract provision is triggered;

(2) That money currently in hand is worth 6 percent more in terms of its investment value than the same amount deferred 1 year later;

(3) That if the disallowed portion of the increase were payable presently in equal periodic (weekly, monthly, etc.) installments, the employee will be losing over a period of 1 year an average of 3 percent of the value of the increase by not being able to receive it in equal installments commencing with the effective date of the contract.

Utilizing the above criteria in the instant case but recognizing that other criteria for evaluation might also be appropriate, the present value of the disallowed portion is 3.5 percent (assuming the Board will approve only a 5.5-percent increase) less 3 percent of 3.5 percent, which equals 3.4 percent. Therefore, the parties cannot keep the clause in the contract and remain within the 5.5 percent permissible increase.

If controls are not lifted on May 1, 1973, then the agreement could be re-evaluated with a different trigger date and the consequent diminished value of the increase in 1972 would be taken into consideration by the Pay Board when it reviews the second or third year increase contained in the contract.

This ruling has been approved by the General Counsel of the Pay Board.

No. 1972-33:

Facts. Employer A and the union representing his employees agree to a 9 percent increase, effective immediately, on March 1, 1972. There is a further provision in the agreement which states that in the event the Pay Board disapproves any portion of the increase that portion will be payable retroactively to March 1, 1972, when controls are lifted. The Pay Board subsequently approves a 5.5 percent increase but expressly

disapproves the provision of the agreement cited above, stating that it constitutes a 3.5 percent increase in wages and salaries payable as deferred compensation. The parties nevertheless decide to leave it in the agreement.

Issue. Does the action of the parties in leaving the deferred increase provision in effect constitute a violation within the meaning of § 201.17 of the Pay Board regulations?

Ruling. Yes. Section 201.17(d) provides that it is a violation to "Fail or refuse to comply with an order or decision of the Pay Board or to induce, solicit, encourage, force, or require any other person to fail or refuse to comply with an order or decision of the Board." This subsection makes clear that if the Board renders a decision, it is a violation for any person to refuse to comply with it.

Moreover, the language in § 201.17 providing that it shall not be a violation to "bargain for, request, contract for, or agree to a wage and salary increase in excess of the standard" does not remove the basis for a violation. This clause was included in § 201.17 to permit the parties to bargain freely prior to submitting their eventual agreement to the Pay Board for approval of an exception to the standard. Once the Board has decided that an agreement to pay an amount in excess of the standard constitutes an actual increase in wages and salaries, such agreement no longer comes within the proviso permitting agreements in excess of the standard. The Board has ruled that it is more than an agreement—it is a wage and salary increase payable as deferred compensation.

This ruling has been approved by the General Counsel of the Pay Board.

No. 1972-74:

As part of its recodification, the Pay Board will update and republish its prior rulings to reflect changes in its regulations and, in some cases, changes in form or terminology, prior to, and as a part of

recodification. Accordingly, this ruling revokes all Pay Board rulings heretofore published. Those rulings which are updated and are in current conformance with the final recodification of the Pay Board regulations are being republished in this issue of the Federal Register (Pay Board Rulings 1972-74 through 1972-120).

This ruling has been approved by the General Counsel of the Pay Board.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-3-74-146

DEAN TAYLOR,

Plaintiff,

v.

THE LIBERAL MARKET, INC.,

Defendant.

STIPULATION AS TO FACTS

(Filed December 5, 1974)

The parties stipulate for the purposes of this case only that the following facts are true and undisputed and that the documents attached as exhibits are true and authentic copies:

Plaintiff Dean Taylor is, and has at all relevant times been, an employee of Defendant The Liberal Market, Inc. ("Liberal"). Teamsters Local 957 is the bargaining representative for Liberal's warehouse employees classified as Freezermen, Drivers, Lead Men, Lift Operators, Warehousemen or Warehouse Porters (the "warehousemen"). Mr. Taylor is, and has at all relevant times been, a member of that bargaining unit and a member of Local 957.

Liberal is a firm in the retail food industry with its offices and principal place of business in Dayton, Ohio. Liberal purchases raw agricultural products, dry grocery products and canned goods from suppliers located in at least thirty-five different states, stores these and other products in their warehouse, and transports such products to its retail supermarkets located in Ohio and Kentucky for resale to consumers.

Appendix C

During the course of negotiations, Local 957 proposed an increase in straight time hourly wages of thirty-five cents per year for each of three years. This proposal by Local 957 was incorporated in the final agreement which became the collective bargaining agreement (the "Agreement") to be effective for a three year period ending August 1, 1975. The new collective bargaining agreement was actually executed August 5, 1972, but was effective as of August 1, 1972, by its terms. It provided for several increases in wages and fringe benefits to be effective during the first contract year (August 1, 1972—July 31, 1973), among them being an increase in the straight time hourly wage rate of thirty-five cents. A similar thirty-five cent raise was provided for each of the two succeeding contract years (August 1, 1973—July 31, 1974 and August 1, 1974—July 31, 1975).

Article XV of the Agreement provides:

> If any proposal submitted by the Union, if granted, may not be put into effect because of applicable legislation, Executive Orders or Regulations dealing with Wage and Price Stabilization, then such proposals, or any part thereof, including any retroactive requirement thereof, shall become effective at such times, in such amounts, and for such periods, retroactively and prospectively, as will be permitted by law at any time during the life of this Agreement and any extension thereof.

The Agreement was executed during the period of Phase II of economic controls. During Phase II, bargaining units were generally limited to annual increases in wages and fringe benefits equal to 5.5%; amounts in excess of that limit could be paid only if prior approvals (called "exceptions") were obtained from the Pay Board or from one of the District Directors of the Internal Revenue Service to whom the Pay Board had delegated the responsibility to initially consider and rule upon such exception requests.

Appendix C

The aggregate value of the wage and fringe benefit improvements scheduled under the Agreement to be implemented during the first contract year exceeded the 5.5% limit by seventeen cents per hour, and in the absence of an exception, Liberal was able to implement an increase of only eighteen cents per hour of the thirty-five cents per hour increase provided as of August 1, 1972, under the Agreement. This was reflected in a letter of understanding, also dated August 5, 1972.

On August 21, 1972, Liberal's Director of Personnel submitted an exception request on behalf of Liberal, Local 957 and the warehousemen to District Director Paul A. Schuster requesting permission to implement the additional seventeen cent increase in straight-time wages scheduled under the Agreement to become effective as of August 1, 1972. On September 6, 1972, District Director Schuster denied that request. Neither Liberal nor Local 957 nor any of the warehousemen filed an appeal from this decision.

Because of the 5.5% limit, on August 1, 1973, Liberal was able to implement only twenty-seven cents of the thirty-five cent increase scheduled for the second contract year. On August 31, 1973, Peter J. Rakay, Esq., attorney for Local 957, wrote to Peter A. Tchirkow of the Cost of Living Council requesting an exception for Liberal to pay the additional eight cents per hour.

On March 6, 1974, the Cost of Living Council issued a "Decision and Order" authorizing Liberal to implement the eight cents per hour for the second contract year. Payments were made retroactively to August 1, 1973. Consequently, the warehousemen received the entire thirty-five cent per hour increase scheduled for the second contract year.

By letter dated April 26, 1974, Gary L. Legg, President of Local 957, stated that he understood that

controls dropped on April 30, 1974, and requested that Liberal implement the seventeen cent increase which had not been put into effect during the wage control period because of Director Schuster's Order and to make retroactive payment of such amount. Liberal increased wages by the seventeen cents per hour effective May 1, 1974, with respect to work performed on or after such date, but refused to retroactively pay seventeen cents per hour for the period August 1, 1972, through April 30, 1974. Thus, the members of Local 957 have been paid the contract rate from May 1, 1974, to the present, and the only dispute is for seventeen cents per hour for the period August 1, 1972, through April 30, 1974. (Exhibit references omitted)
Agreed to:

/s/ CHARLES J. SIMPSON
CHARLES J. SIMPSON
Trial Attorney for Plaintiff
258 Dayco Building
333 West First Street
Dayton, Ohio 45402
Telephone: (513) 223-1637

/s/ R. JOSEPH PARKER
R. JOSEPH PARKER
Trial Attorney for Defendant
600 Dixie Terminal Building
Cincinnati, Ohio 45202
Telephone: (513) 381-2838

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